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CHARLES ELMORE

No. 297

IN THE

Supreme Court of the United States

October Term, 1949.

JAMES T. RITTER, - - - - - - - Petitioner,

versus

COMMONWEALTH OF KENTUCKY, - Respondent.

RESPONDENT'S ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY AT FRANKFORT, KENTUCKY.

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WESTERFIELD-BONTE CO., INCORPORATED, LOUISVILLE, KY.

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JAMES T. RITTER, - - - - - - - *Petitioner,*

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COMMONWEALTH OF KENTUCKY, - - *Respondent.*

RESPONDENT'S ANSWER TO THE PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE COMMONWEALTH OF KENTUCKY AT FRANKFORT, KENTUCKY.

To the Chief Justice and Associate Justices of the Supreme Court of the United States:

It is respectfully submitted by the Commonwealth of Kentucky that the decision of the Court of Appeals in affirming the judgment of the Boyle Circuit Court in Boyle County, Kentucky, did not deprive the petitioner, James T. Ritter, of any constitutional right and the petition for the writ of certiorari should be denied.

HISTORY OF THE CASE.

The petitioner, James T. Ritter, was convicted in the quarterly court of Boyle County, Kentucky, of the offense of illegally transporting alcoholic beverages for purposes of sale in dry territory. His punishment was fixed at 30 days in jail and $100 fine. The petitioner appealed to the Boyle Circuit Court where a trial *de novo* was had and the conviction was affirmed, the jury fixing punishment at 60 days in jail and $100 fine. The petitioner made motion for an appeal to the highest court in Kentucky, the Court of Appeals of Kentucky, and that Court affirmed the judgment of the Boyle Circuit Court in a *per curiam* opinion.

The petitioner now prays the Supreme Court of the United States for a writ of certiorari to the Court of Appeals of Kentucky, contending that the admission of evidence obtained by an illegal search and seizure is in violation of the Fourth, Fifth and Fourteenth Amendments of the Federal Constitution.

QUESTIONS PRESENTED.

Do the facts presented indicate that the search following the lawful arrest was so unreasonable as to constitute an invalid search and thereby contravene the Due Process Clause of the Fourteenth Amendment of the Federal Constitution?

Is the Fourth or Fifth Amendment of the Federal Constitution violated by the introduction in a State

court of evidence obtained by an illegal search and seizure?

Is the Fourteenth Amendment of the Federal Constitution violated by the introduction in a State court of evidence obtained by an illegal search and seizure?

THE FACTS SUPPORTING THE SEARCH.

Two Kentucky Highway Patrolmen were approaching the city of Danville on a State highway when they saw a car stopped on the road facing them with its undimmed lights shining down the road. The patrolmen proceeded in the direction they originally traveled for a short distance to a place where they could turn around, and then came back to determine the trouble with the parked car, it being the custom of highway patrolmen to render aid to distressed travelers. Just as they neared the stopped vehicle it suddenly started off and, according to the testimony of the patrolmen, the car was driven in a reckless manner, that is, from one side of the center line of the road to the other side of the center line. The patrolmen then sped up, turned on their red lights and sirens and forced the other car to stop. A request by the patrolmen for the driver to produce his driver's license revealed that he had none. The driver did produce a license from under the sun visor, but examination revealed that it was issued in the name of another person, not the name claimed by the driver of the car. He was therefore arrested by the officers for

reckless driving and driving without a license, in violation of Kentucky laws.

Further investigation revealed that the petitioner and the petitioner's wife occupied the back seat. Petitioner was quite intoxicated and his wife had been drinking. After making the arrest the patrolmen searched the automobile and the trunk was found to contain 8 cases of beer, 1 fifth of whiskey and 23 pints of gin. It is in the introduction of this evidence that the petitioner claims to have been deprived of his constitutional rights.

ARGUMENT.

The Search and Seizure Were Reasonable and Valid.

It is well settled in Kentucky that in certain instances a search of an arrested person and the automobile under his control at the time of his arrest, immediately following his arrest for a misdemeanor or a felony committed in the arresting officers' presence, is a valid arrest and search and the evidence thus revealed may be introduced in the trial against him without depriving him of any constitutional rights. Engle v. Commonwealth, 204 Ky. 518, 264 S. W. 1088; Commonwealth v. Phillips, 224 Ky. 117, 5 S. W. 2d 887; Dillings v. Commonwealth, 223 Ky. 381, 3 S. W. 2d 770.

Although the Fourth Amendment stands as a prohibition against action by the Federal Government that constitutes an infringement upon the right of individuals to privacy and freedom from unreason-

able searches and seizures, the "Due Process Clause" of the Fourteenth Amendment operates in a different manner upon the States. The Fourteenth Amendment only protects those rights which have been deemed to be inherent in the very essence of our democratic way. The Fourteenth Amendment does not incorporate the Bill of Rights, though it does secure some of the rights secured by the first ten amendments, not because those rights appear in the first ten amendments but because those rights are deemed to be basic freedoms the contravention of which is a denial of due process of law. Thus it has been held that the "Due Process Clause" does not prevent the action of a State in technically requiring a citizen to testify against himself in certain instances, although such action is condemned by the Constitution when indulged in by the Federal Government. Palko v. Conn., 302 U. S, 319, 82 L. Ed. 288. The Due Process Clause is not contravened by the action of a State in allowing evidence to be introduced against a citizen although the evidence was admittedly procured by an illegal search and seizure. Wolf v. Colorado, 93 L. Ed. 1356, 69 S. Ct. 1359 (case decided June 27, 1949 and no official citation is available in State Library).

Mr. Justice Frankfurter, in discussing the operation of the Fourteenth Amendment, in the case of Louisiana v. Resweber, 329 U. S. 459, 91 L. Ed. 422, stated:

> "In short, the Due Process Clause of the Fourteenth Amendment did not withdraw the freedom of a state to enforce its own notions of fairness

> in the administration of criminal justice unless, as it was put for the court by Mr. Justice Cardoza, 'in so doing it offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' "

Although outright sanction by a State of unlawful search and seizure is undoubtedly condemned by the Fourteenth Amendment as being inherently repugnant to due process of law, the Fourteenth Amendment prescribes no standard or measure by which is to be determined what shall be deemed an infringement of this basic freedom. Equally important, the due process clause as was clearly illuminated by the Court in the Palko v. Conn. and the Louisiana v. Resweber cases, *supra,* does not narrowly confine or restrict the States in determining through experience and years of practice what principles of criminal practice constitute a denial of due process. The only rule or measure for determining what is a denial of due process and therefore a contravention of the Fourteenth Amendment is to consider the alleged intrusion of rights and determine whether or not it violates some recognized principle of justice so well-founded in the traditions and consciences of our people as to be fundamental.

The rule that as an incident of lawful arrest a person and his immediate possessions may be searched is almost as fundamental as the rule against unlawful searches and seizures itself. Houghton v. Bachman, 47 Barb. 388, 1 Bishop Cr. P. section 211; 9 Halsbury Laws of England, p. 309. In Harris v. U. S., 331 U. S.

145, 91 L. Ed. 1399, Mr. Justice Vinson, speaking for the Court, said:

> "The Fourteenth Amendment has never been held to require that every valid search and seizure be effected under the authority of a search warrant. Search and seizure incident to lawful arrest is a practice of ancient origin and has long been an integral part of the law enforcement procedures of the United States and of the individual states."

Indeed, the practice is well recognized in many of the States today. The following cases are examples of the different jurisdictions recognizing the reasonableness of the rule holding that following a lawful arrest of a person in a vehicle the arresting officer does not violate any constitutional guarantees by searching the person arrested and the vehicle: U. S. v. Lee, 47 S. Ct. 746, 274 U. S. 559, 71 L. Ed. 1202; Sugarman v. U. S., 35 F. 2d 663, certiorari denied in 281 U. S. 723; U. S. v. Marsh, 29 F. 2d 172, certiorari denied in 279 U. S. 849, 73 L. Ed. 992; Commonwealth v. Chaplin, 307 Ky. 630, 211 S. W. 2d 841; State (Mo.) v. Curenza, 212 S. W. 2d 743; Smith v. State, 215 Ind. 629, 21 N. E. 2d 709; Allgaier v. State, 200 Ind. 583, 164 N. E. 315; Silverstein v. State, 176 Md. 533, 6 A. 2d 465; Raby v. State (Okla.), 163 P. 2d 239; People v. Overton, 293 Mich. 44, 291 N. W. 216; Brown v. State, 179 Miss. 696, 176 S. 721; Scott v. State, 134 Tex. Cr. R. 193, 114 S. W. 2d 565.

It is the petitioner's view that since there was no connection between the offense for which the driver

was arrested and the articles seized, the search was unreasonable and therefore illegal. Such a position ignores the facts and principles of law well established and applicable thereto. The arrest of the driver for the misdemeanors committed in the officers' presence was unquestionably a legal arrest.

Section 36 of the Kentucky Criminal Code provides that a peace officer may make arrests of individuals committing misdemeanors in his presence. The circumstances leading up to and surrounding the petitioner's detention on the highway more than justified the arrest and search of the person and the automobile under his control. The fact that the car was stopped on the highway late at night (a violation of the State traffic laws), the fact that the parties were under the influence of intoxicants, the fact that the driver's license produced by the driver was not his own, the fact that the car was driven in a reckless manner when approached by the Highway Patrol car, the fact that the petitioner was drunk in a public place (a violation of section 244.020 of the Kentucky Revised Statutes), and, finally, the fact that these combined acts occurred in dry territory were all circumstances so provocative it would have been nothing short of neglect of duty for the arresting officers to have failed to search the arrested parties following the lawful arrest in order to obtain evidence relating to the offenses for which they were arrested.

The arrest of the petitioner for being drunk in a public place (see Summary of Matters Involved at page 3 of petitioner's brief), an offense committed in

the officers' presence justified the officers in searching petitioner for evidence supporting the drunk charge. The knowledge had by the officers that the petitioner was drunk in a public place, the arrest of the petitioner on that charge, and the search revealing contraband liquor were not only so closely related in time, but also so closely related in kind that they actually composed one transaction. The petitioner's drunkenness on a public highway, an offense committed in the presence of the officers, justified the arrest of the petitioner and the search of the petitioner for evidence of the offense committed in the presence of the officer.

The respondent is well aware of the decisions of this Court and the courts of other jurisdictions that a search of the person arrested for the commission of so trivial an offense as driving without a license is unreasonable and unwarranted, as indicating a mere pretense or excuse upon which to make a search, the reason for the rule being that law enforcement officers cannot under pretense of lawful arrest conduct a searching mission to obtain evidence of an offense upon which to predicate an arrest. But we are equally mindful of decisions to the effect that following an arrest for a misdemeanor, when the circumstances give reasonable grounds to the arresting officer to believe that a search is necessary to support the offense for which the party was arrested, then the officer is not only justified in continuing the search but in also seizing any contraband thus revealed. See Callahan v. State, 42 Okla. Cr. R. 425, 276 P. 494; Allgaier v. State, 200 Ind. 583, 164 N. E. 315; Rucker v. State,

77 N. E. 2d 355; U. S. v. Petti, 168 F. 2d 221; U. S. v. Miller, 22 F. Supp. 542; People v. DeMarios, 401 Ill. 146, 81 N. E. 2d 464; People v. Dubin, 367 Ill. 229; 10 N. E. 2d 809; People v. Barg, 384 Ill. 172, 51 N. E. 2d 168, certiorari denied 321 U. S. 798, 88 L. Ed. 1086; Hill v. State, 59 A. 2d 630.

The basis for preventing the promiscuous exercise by police officers of their power to arrest and search is directed to the subjection of private citizens to searches revealing incriminating evidence upon which to predicate an arrest, but when an individual has already been arrested for an infraction of the law, the reason for the rule no longer exists and the officers making the arrest have reduced the individual to control and may search the arrested party or the possessions under his immediate control. If the thus warranted search reveals evidence of another offense, constitutional guarantees do not require enforcement officers to shut their eyes to the other offense being committed in their presence but, rather, the police power of the State designed for the protection of the general public demands that the officers seize and turn over to the proper authorities contraband thus discovered.

The attempted invocation of the rule that the articles seized resulting from the search must relate to the offense for which the person is arrested and not to any other offense is not a logical extension of the rule against illegal searches and seizures since in its very inception it affords no further protection to citizens. The question in each of these cases should

be, is the search made in order to discover evidence upon which to predicate an arrest or is the search incidental to the arrest after the latter has already been effected. The rule that the objects seized must relate to the offense merely places another barrier in front of effective law enforcement with no corresponding increase of protection to the individual as concerns due process. See Harris v. U. S., 91 L. Ed. 1399, 331 U. S. 145.

The Petitioner Cannot Complain of the Alleged Illegal Search and Seizure On the Grounds That It Denies Him Constitutional Rights Because the Immunity Afforded By This Aspect of the Due Process Clause Is Personal and Extends Only to the Party Claiming Ownership of the Premises Searched or the Articles Seized.

It was the petitioner's contention and the contention of Lyndon Lovelace, petitioner's chief witness, that the articles seized were the property of Lovelace and not the property of the petitioner. The record further indicates that the automobile was not registered in the name of the petitioner but in the name of the petitioner's wife, thus indicating legal ownership in Mrs. Ritter and not in the petitioner. By the great weight of authority the immunity from unreasonable searches and seizures is a personal right and cannot be claimed by one who claims no interest in the property seized and is not the owner of the premises searched. Belcher v. U. S., 50 F. 2d 573; Cravens v. U. S., 62 F. 2d 261, certiorari denied 53 S. Ct. 594, 289 U. S. 733, 77 L. Ed. 1481; Love v. State,

177 P. 2d 846; Hogg v. U. S., 35 F. 2d 954; Kelley v. U. S., 61 F. 2d 843, 86 A. L. R. 338; Safarik v. U. S., 62 F. 2d 892; Patterson v. U. S., 31 F. 2d 737; The Evelyn, 2 F. Supp. 911; Piercefield v. State, 198 Ind. 440, 154 N. E. 4; Wax v. Commonwealth, 214 Ky. 480, 283 S. W. 430; Gilliland v. Commonwealth, 224 Ky. 453, 6 S. W. 2d 467; Carter v. Commonwealth, 234 Ky. 695, 28 S. W. 2d 976; Combs v. Commonwealth, 242 Ky. 793, 47 S. W. 2d 725; Baum v. State, 163 Md. 153, 161 A. 244; People v. Weaver, 241 Mich. 616, 217 N. W. 797; Roberts v. State, 153 Miss. 622, 121 S. 279; State v. Askew, 331 Mo. 684, 56 S. W. 2d 52; Williams v. State, 35 Okla. Cr. R. 171, 249 P. 433; Yeager v. State, 106 Tex. Cr. R. 462, 294 S. W. 200; State v. Much, 156 Wash. 403, 287 P. 57.

The petitioner was neither in possession of the automobile, for he and his wife had relinquished any possession he had had to Lovelace because he was admittedly too intoxicated to drive, nor was he the apparent legal owner of the car, for the car was registered in the name of his wife.

To allow the petitioner to assert ownership now has placed him in the position to deny ownership of the liquor or the possession of the liquor for the purposes of evading criminal liability for transporting liquor for purposes of sale in dry territory or on the other hand to assert ownership in order to invoke the aid of the Due Process Clause in suppressing the evidence. Such a position cannot be maintained. In harmony with the authority on the subject, therefore, the petitioner cannot invoke the rule suppressing

evidence introduced because obtained by an illegal search and seizure where he is neither the owner of the vehicle searched nor where he denies ownership of the articles seized.

The Action of the State Court in Allowing the Admission of Evidence Allegedly Procured by Illegal Search and Seizure Does Not Violate the Fourth and Fifth Amendments of the Federal Constitution.

The petitioner cannot invoke the aid of the Fourth and Fifth Amendments of the Federal Constitution because these amendments have consistently been held to be restraints on the power of the Federal Government and are not directed to the States. Ensign v. Pa., 57 L. Ed. 658, 33 S. Ct. 321, 227 U. S. 502; Brown v. N. J., 44 L. Ed. 119, 175 U. S. 172; Collins v. Johnson, 59 L. Ed. 1071, 35 S. Ct. 649, 237 U. S. 502; Barrington v. Mo., 205 U. S. 483, 27 S. Ct. 582, 51 L. Ed. 890; Wolf v. Colorado, 93 L. Ed. 1356, 69 S. Ct. 1359 (case decided June 27, 1949, no official citation available to date in State Library); Palko v. Conn. 302 U. S. 319, 82 L. Ed. 288.

The Action of the State Court in Allowing the Admission of Evidence Allegedly Procured by Illegal Search and Seizure Does Not Violate the Fourteenth Amendment of the Federal Constitution.

In the case of Wolf v. Colorado, *supra,* this Court had before it the question "Does a conviction by a State court for a State offense deny the 'due process of law' required by the Fourteenth Amendment solely

because evidence that was admitted at trial was obtained under circumstances which would have rendered it inadmissible in a prosecution for a violation of a federal law in a court of the United States because there deemed to be an infraction of the Fourth Amendment as applied in Weeks v. U. S., 232 U. S. 383, 58 L. Ed. 652, 34 S. Ct. 341, L. R. A. 1915 B 834, Ann. Cas. 1915 C. 1177?" This Court in the Wolf v. Colorado case, *supra,* decided that the admission of evidence thus procured did not contravene the Fourteenth Amendment, Mr. Justice Frankfurter, speaking for the Court, saying:

> "We hold, therefore, that in a prosecution in a state court for a state crime the Fourteenth Amendment does not forbid the admission of evidence obtained by an unreasonable search and seizure."

In the instant case the petitioner is seeking to obtain a reversal of the Court of Appeals of Kentucky solely on the ground that the admission of evidence procured by an allegedly illegal search and seizure was a denial of due process of law and therefore conflicts with the Fourteenth Amendment. The admission of evidence obtained by illegal search and seizure is not prohibited by the Fourteenth Amendment and since this is the only basis upon which the appellant claims to have been denied due process of law the decision of the Court of Appeals should not be disturbed.

CONCLUSION.

It is respectfully submitted by the Commonwealth of Kentucky that for the foregoing reasons the petitioner, James T. Ritter, has not been deprived of any constitutional rights and, therefore, his petition for a writ of certiorari to the Court of Appeals of Kentucky should be denied.

Respectfully submitted,

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